United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1687

74-1687

B
P/S

HOOKER CHEMICALS AND PLASTICS CORPORATION
STAUFFER CHEMICAL COMPANY
AND MONSANTO COMPANY,

Petitioners,

v.

RUSSELL E. TRAIN,

Respondent.

On Petition For Review Of Action Of The
Administrator Of The Environmental
Protection Agency

REPLY BRIEF FOR PETITIONERS

ROBERT C. BARNARD
DOUGLAS E. KLIEVER
HENRY J. PLOG, JR.
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

ATTORNEYS FOR PETITIONERS

OF COUNSEL:

CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

December 19, 1974

3

TABLE OF CONTENTS

AUTHORITIES CITED

CASES:

STATUTES:

Federal Water Pollution Control Act

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER NOTICE

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 74-1687

HOOKER CHEMICALS AND PLASTICS CORPORATION,
STAUFFER CHEMICAL COMPANY, AND MONSANTO COMPANY

Petitioners

v.

RUSSELL E. TRAIN

Respondent

REPLY BRIEF FOR PETITIONERS

Preliminary Statement

This case and No. 74-1683 involve the validity of the Environmental Protection Agency regulations establishing effluent limitations guidelines for existing sources (No. 74-1687) and standards of performance for new sources (No. 74-1683) in the phosphate manufacturing category.

These cases involve, in part, the soundness of the effluent guidelines and standards of performance for the phosphate industry. The issues have been somewhat narrowed by EPA concessions that it erred in establishing the regulations for five products. Its defense for the remaining effluent guidelines for 1983 is not meaningfully different

from its defense of the new source standards in No. 74-1683. Therefore, to avoid repetition, Petitioners respectfully refer the Court to their reply brief in No. 74-1683 for response to EPA's arguments pertaining to the 1983 effluent guidelines for phosphorus and phosphorus pentasulfide plants and the definition of "process waste water" as it applies to the phosphate industry guidelines. The 1977 effluent guidelines for phosphorus plants are discussed in this brief.

This case also involves issues basic to the interpretation of provisions of the Federal Water Pollution Control Act requiring effluent guidelines and effluent limitations for existing plants. Numerous actions are pending in Federal courts throughout the nation which raise these issues, but no Court of Appeals has yet issued a decision respecting them.[1/] This action also is related to a case before this Court, Natural Resources Defense Council v. Environmental

---

1/ Two recent unreported decisions of district courts entered subsequent to Petitioners' brief hold that EPA has authority to issue effluent limitations by regulation under Section 301. Both decisions were on motions to dismiss and did not involve review on an administrative record. American Paper Institute v. Train, _____F. Supp. _____, Civil Action No. 74-814 (D.D.C., decided September 18, 1974) and E. I. DuPont de Nemours & Company v. Train, ____F. Supp. ____. Civil Action No. 74-57-R (W.D.Va., decided September 27, 1974). These opinions are appended to this brief as Appendices A and B respectively.

Protection Agency, No. 74-1258. In view of the intertwined issues and parties in these cases and No. 74-1258, Petitioners have moved for accelerated scheduling of oral argument such that Nos. 74-1683 and 74-1687 may be argued concurrently with No. 74-1258. 1/

P A R T O N E

EPA'S CONSTRUCTION OF THE STATUTE WOULD ESTABLISH, AS DEMONSTRATED BY ITS CONCEDED ERRORS IN THE PHOSPHATE REGULATIONS, AN UNWORKABLE REGULATORY SCHEME

EPA in its argument on the basic issues of jurisdiction and statutory construction repeatedly refers to its detailed statements of methodology for arriving at the regulations in an obvious attempt to lend credence to its concept of Federally established uniform national effluent limitations as a sound and reasonable regulatory approach. 2/ Resp. Br. at 16, 18, and 36-41. EPA describes Petitioners' challenge to EPA's tenets as a "misrepresentation" for the purpose of

---

1/ The Petitioner in No. 74-1258, Natural Resources Defense Council, has challenged a specific portion of the regulations for the phosphate manufacturing point source category. A petitioner in this case, Monsanto Company, has intervened in No. 74-1258. The Natural Resources Defense Council has filed a motion for leave to file as amicus curiae in this case.

2/ Citations in this brief to Respondent's Brief (Resp. Br.) refer to Respondent's Brief in No. 74-1687.

delaying implementation of the effluent limitations. Resp. Br. at 19-20 and 32.[1/]

There is one stark fact in this case: EPA admits that it made major errors in establishing its "effluent limitations" for the phosphate industry. It has agreed that the definition of process waste water, which is fundamental to the application of the guidelines for the entire category, must be modified. Resp. Br. at 51-52. It now decides it erred in establishing a zero discharge 1977 requirement for phosphorus pentasulfide plants. Resp. Br. at 86. It concedes that establishing a zero discharge requirement for 1983 for phosphorus oxychloride and trichloride plants was not well thought out. Resp. Br. 76-77. It now sees that it has no basis for a uniform zero-discharge requirement for foodgrade sodium tripolyphosphate and calcium phosphate plants. Resp. Br. at 87. While it resolutely defends the effluent restrictions for phosphorus plants, it confesses that the failure to make allowances for excess rainfall was one of its "unintended

---

1/ EPA cites the District Court decision in E. I. DuPont de Nemours v. Russell E. Train, supra at page 2, note 1, to support its thesis that Petitioners seek delay through "duplicitous litigation." Resp. Br. at 31-32. The District Court's concern was based upon the assumption that EPA was to promulgate both Section 301 effluent limitations and Section 304(b) effluent guidelines. Slip. op. at 15 (Appendix B). Petitioners contend that EPA has authority to promulgate only effluent guidelines under Section 304(b) and that, if it had followed the statutory mandate, permit granting agencies could have gotten to the critical business of establishing effluent limitations in permits with reference to EPA's guidelines.

inconsistencies". Resp. Br. at 71. It also insists that the regulation must be read in light of its policy on "net-gross" and that, as soon as that policy is promulgated as a regulation, "there will be no uncertainty on how the presently disputed guidelines are to apply." Resp. Br. at 61.

EPA's mistakes constitute Petitioners' motive, and need, for seeking judicial review. Obviously concerned about the state of its regulations, EPA attempts to pass it off by suggesting that, while Petitioners "may dispute the factual conclusions reached", they must concede "as a matter of law that the Administrator followed the procedural requirements of the Act." Resp. Br. at 48. The regulations, of course, must be remanded to EPA for correction of its errors. However, EPA's regulations demonstrate a far more fundamental point. EPA adopted an interpretation of the statute which it is wholly unable to implement in a reasonable fashion.

EPA says that it must have absolutely uniform national effluent limitations and that it has properly established such regulations. Yet, when faced with the need to defend a regulation based on a uniform, sweeping definition of process waste water, it concedes that it must introduce a degree of flexibility by redefining process waste water and insisting that permit-granting authorities establish sound, and stringent, effluent limitations for the sporadic wastes which constitute a large portion of the waste effluent from phosphate industry plants. Similarly, it acknowledges that nationally uniform effluent

limitations must be changed to account for geographical differences in rainfall.

EPA insists that the concept of nationwide uniformity must be implemented by identical effluent limitations for plants in a subcategory regardless of the differences among plants in the subcategory. In pursuit of that objective, EPA has sown the seed of inevitable inequity. For example, in response to the obstacles to achieving zero discharge at phosphorus plants located in severely cold climates, EPA in its brief blandly provides a list of measures which could be taken by such plants in addition to those which their competitors in more temperate climates would need (Resp. Br. at 65-66) and then suggests the cost inequity created should be disregarded because the cold climate plants are not typical compared to plants in warm climates. (Resp. Br. at 72-73).

EPA says that the Congress insisted that it establish nationally uniform effluent limitations based on the performance of exemplary plants. Resp. Br. at 44-48. Petitioners certainly do not disagree that reference to the performance of exemplary plants is an appropriate starting place for the development of technically, economically and environmentally sound regulations. However, EPA's methodology did not use exemplary plants as a starting point; its thinking processes ended when a plant or plants were tagged as exemplary because its intention was to derive regulations [redacted] a single number limit. For example, EPA in its brief states that its 1977 effluent guidelines for phosphorus plants are based on data for three plants which employ best practicable control

technology but which achieve different effluent levels. Instead of analyzing in a meaningful manner the differences among these plants and establishing guidelines which account for them, EPA says it averaged the effluent levels for these three plants and promulgated that average as the "effluent limitation" for all phosphorus plants. Two of the three exemplary plants do not meet that uniform guideline or limitation even though they employ best practicable control technology currently available, which is precisely the technological level which must be achieved under Section 301(b)(1).[1/]

EPA says that it followed the will of the Congress when it considered the factors specified in Section 304(b) only in establishing categories and subcategories. Resp. Br. at 38. Yet, EPA now admits, for example, that foodgrade sodium tripolyphosphate plants must be differentiated from non-foodgrade plants. Resp. Br. at 87.

EPA says that the record shows "positively that these [Section 304(b)] factors were considered by the Administrator * * *". Resp. Br. at 39. Certainly, the record abounds in self-serving statements that energy and other statutory factors was taken into account. But EPA

1/ See infra, at pages 31-35.

now admits that, in practice, there were significant oversights such as when it recognized "in retrospect" that "evaporation for the purpose of preventing a discharge of dissolved chloride [from phosphorus trichloride and oxychloride plants] may not be justified" in light of the Congressional mandate to consider energy requirements. Resp. Br. at 77.

The conclusion is clear. EPA set out to establish in Washington, D.C., effluent limitations for all industrial plants throughout the country. That task is impossible and was never intended by the Congress. The only answer is for EPA to now establish the objective effluent guidelines required by Congress under Section 304 to ensure that permits granted under Section 402 establish the effluent limitations required to be achieved by Section 301 and the uniformity for similarly situated facilities anticipated by the Congress.

P A R T T W O

I. EPA'S INTERPRETATION OF SECTION 301 REQUIRES THE COURT TO READ SECTION 304(b) OUT OF THE ACT

Through a series of relatively recent pronouncements, including its brief in this case, EPA has added a note of mystery into the interpretation of the Federal Water Pollution Control Act. Like a magician, EPA has attempted to create the illusion that Section 304, a key component of the Act, does not exist. Section 304 seems to have been shunted aside in EPA's headlong rush toward setting limitations by regulation.

The implementation, or lack thereof of Section 304(b) constitutes a key issue in these actions. 1/

Respondent EPA asserts that its regulations are somehow both Section 301 effluent limitations and Section 304 effluent guidelines. Resp. Br., at 18. However, EPA assigns legal purpose and effect to the regulations only insofar as they are Section 301 effluent limitations. EPA does not provide an explanation of where in its regulations the Section 304(b) guidelines are. By Congressional mandate, section 304(b) effluent guidelines are not only to be formal regulations but also are to have a specific configuration and content. EPA reluctantly concedes that the "definitional meat" of the Section 304(b) guidelines must include the "particular nature of the pollutants from each category and with respect to the particular techniques and processes,

---

1/ The District Court in E.I. DuPont de Nemours & Co. v. Train (Appendix B hereto) did not rule on the contention that the regulations failed to specify factors as required by the statute, since in the Court's view such an issue had to be resolved by a Court of Appeals:

> "[T]he court believes that any challenge to the Administrator's consideration of various factors or the weight given to each, like the challenge to actual numerical limitations, is in essence a challenge to the Administrator's action in promulgating effluent limitations under section 301 and must be pursued under section 509(b)(1)(E) in the Court of Appeals." (E. I. DuPont de Nemours & Co. v. Train, supra, slip opinion, at 15)(Appendix B).

industry structure and problems related to each category." Resp. Br. at 30.[1] Yet even this minimal meat is wholly missing from the regulations.[2]

In contrast to Sections 301(b) and 304(b), the Congress in Section 306 required EPA to promulgate standards of performance for new sources and in Section 304(c) required EPA to publish "information" on methods to implement the new source standards. Thus, if the Congress had intended Section 304(b) to be merely informational, it would have so provided as it did in Section 304(c).

II. EPA'S CONTENTION THAT IT HAS AUTHORITY TO ISSUE REGULATIONS UNDER SECTION 301 ESTABLISHING LIMITATIONS IS BASED ON A CONSTRUCTION WHICH WOULD CREATE BY IMPLICATION A MASSIVE NEW CRIMINAL CODE

EPA states in its brief that Petitioners' argument that the Administrator has no authority under Section 301 to promulgate effluent limitations by regulation "totally warps the framework of the Act". Resp. Br., at 19-20. It is rather

---

1/ In another case before this Court, EPA stated, "These Section 304(b) guidelines must identify the characteristics of pollutants and the amount of reduction attainable through application of the Section 301 tests. The guidelines must also specify the factors considered in establishing effluent limitations." (Brief for EPA, at 20, Natural Resources Defense Council, Inc. v. Environmental Protection Agency, No. 74-1258 (2d Cir.).)

2/ EPA seems to suggest that the Preamble to its regulations and other materials give substance to its regulations. Resp. Br. at 16-17. Section 304(b) guidelines are to be promulgated by regulation and EPA's explanatory materials are not part of the regulations.

EPA's argument that the Administrator can issue Section 301 effluent limitations by regulation which totally warps the framework of the Act by creating, by implication, a massive new criminal code.

Section 309(c) of the Act (33 U.S.C. §1319(c)) provides for criminal penalties for violation, inter alia, of Section 301 or any limitation in a permit issued under Section 402. EPA's construction would create by implication a massive new criminal code, for the regulations providing effluent limitations under Section 301 would then be criminally enforceable. Indeed, the Natural Resources Defense Council, which has sought leave to file a brief as amicus curiae in this case, has urged this as a reason why the Court should imply from the statute the authority to issue regulations under Section 301. Reply Brief for Petitioners, at 10, Natural Resources Defense Council, Inc. v. EPA, No. 74-1258 (2d Cir.). Not only is this contention contrary to the canons of construction that Congress must leave nothing to implication so far as criminal penalties are concerned, it is nonsense if one examines the statutory plan.

Under Section 301(a) all discharges not covered by a permit are unlawful. If a discharger has a permit application pending he is not in violation for discharges prior to December 31, 1974; if he has a permit, compliance with the permit is compliance with Section 301. Section 402(k), 33 U.S.C. §1342(k). If he has no permit, any discharge violates Section 301(a), regardless of the nature or amount of the discharge.

There is no place in this scheme of enforcement for criminal penalties for violation of limitations established by regulations under Section 301. It cannot be suggested that there can be a criminal violation of the regulation during the period a permit is being considered, since the statute says the pendency of a permit application constitutes compliance. There could be no violation if permit conditions are different from the limitations in the regulation because compliance with the permit is compliance with Section 301. This would be so even though there will be differences between permits and the regulations because EPA has issued many permits before the regulation limitations were published and it may well change the regulations. Any attempt to place criminal sanctions on a permittee because the limitations in his permit allowed him to discharge in a different fashion than the regulation limitations would be giving an interpretation based on inference credence over a direct Congressional expression that compliance with a permit equals compliance with the Act.

Moreover, criminal enforcement of limitations by regulation would result in a modification without any statutory basis of the absolute prohibition in Section 301(a) on discharges without a permit, since such enforcement would require either (1) creation of a new criminal offense for violation of the regulation limitations in addition to the offenses already in existence by virtue of the prohibition expressly contained in Section 301(a), or (2) total replacement of the express Section 301(a) prohibition on discharges

without a permit by the prohibition of discharges in violation of the regulation limitations. The latter view of the effect of enforcement of regulation limitations on Section 301(a) would logically seem to lead to the possibility that such enforcement would allow discharges without a permit, as long as they did not violate the regulation limitations. Clearly that quite natural extension of criminal enforcement of such limitations directly contravenes the Congressional intent and scheme.

The regulations, moreover, provide no dates when they become effective.[1/] While they use terms associated with the 1977 standard and the 1983 standard, they are on their face effective on publication as limitations, if EPA is correct. It does no good

---

1/ EPA says that "the deadlines of July 1, 1977 and July 1, 1983 obviously impose time limitations on the issuance of effluent limitations by the Administrator." Resp. Br. at 21, note 2. Thus, suggests EPA, it can promulgate criminally enforceable effluent limitations on the same day -- July 1, 1977, or July 1, 1983 -- that they must be achieved under Section 301(b). In fact, the deadlines which EPA must meet in promulgating its effluent guideline regulations have hinged on Section 304(b) and not 301(b). National Resources Defense Council v. Train, ____F.2d _____, slip op. at 5, 7, 8, 21, and 24-27 (D.C. Cir., December 5, 1974). While the NRDC -- plaintiff in the District of Columbia case, petitioner in No. 74-1258, and amicus in this case -- seems to have difficulty in consistently characterizing the legal basis for EPA's regulations, it had no hesitation in arguing to the District of Columbia Court that the appellate court should affirm the strict deadline established by the District Court for "'final Section 304(b)(1) effluent limitation guidelines'." Appellee's Response to Federal Appellant's Petition for Reconsideration, Oct. 29, 1974, at 19-20.

to say that EPA will not seek criminal sanctions for violation. The issue is whether a new criminal code with gross uncertainties as to dates of application can be created. Furthermore, if the regulations are limitations, they can be enforced by citizen's suits under Section 505 regardless of the views of the present Administrator of EPA.

The opinion in E. I. DuPont de Nemours & Co. v. Train, supra (Appendix B) does not address this question. The Court recognized that both EPA's and Plaintiffs' interpretation "find support in the statute and its history" (Appendix B, at 9-10) but concludes that "taken as a whole" the authority to issue limitations by regulation under Section 301(b) is "implicit" or "implicitly supported" by the provisions of the Act (id., at 10). Had the Court focused on the consequences so far as criminal law is concerned, it would have recognized that contrary to the canons of construction it created a new criminal code by implication. As the Supreme Court has repeatedly said:

> " . . . when choice has to be made between two readings of what conduct Congress had made an issue, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. United States v. Universal Corp., 344 U.S. 218, 221-222 (1952)." (Toussie v. United States, 397 U.S. 112, 122 (1970).)

III. EPA HAS NO IMPLIED AUTHORITY UNDER SECTION 301 TO PROMULGATE EFFLUENT LIMITATIONS BY REGULATIONS AND EVEN IF IT DID, EPA VIOLATED THE ADMINISTRATIVE PROCEDURE ACT IN THE MANNER IN WHICH IT HAS ATTEMPTED TO PROMULGATE SUCH REGULATIONS

A. EPA Has No Implied Authority To Promulgate Effluent Limitations Under Section 301.

1. Provisions Of The Act.

Section 301 contains no express provisions authorizing or directing EPA to promulgate effluent limitations by regulations. Section 301 does, however, have express provisions on regulations to be issued under other sections. Subsections 301(b)(1)(A) and 301(b)(2)(A) make several references to "regulations issued by the Administrator pursuant to Section 304(b)(2) of this Act." This is particularly significant since the Congress in the other major sections of the Act expressly provided for regulations. See, e.g., Sections 302 (water quality), 306 (new source standards), 307 (toxic and pretreatment effluent standards).[1/] In a statute as complex and detailed as the Federal Water Pollution Control Act, it would be

---

1/ Another reference to regulations under Section 304(b) is contained in Section 515(b)(1) which establishes the Effluent Standards and Water Quality Information Advisory Committee (ESWQIAC) to provide "scientific and technical information on effluent standards and limitations" (Section 515(a)(2)). It is notable that while ESWQIAC functions in relation to "effluent standards and limitations", Section 515 contains no reference to Section 301 limitations and EPA's notice of intent to publish effluent standards and limitations (required by Section 515(b)(1)) for the phosphate industry, cites Sections 304(b), 306, and 307 without any mention of 301. "Notice of Intent", April 3, 1973.

strange indeed if Congress were to leave such an important regulatory authority as Section 301 to implication.

With regard to Respondent's citation to Section 501(a)'s grant to the Administrator of authority to prescribe "such regulations as are necessary to carry out his functions under this Act" (Resp. Br., at 24), Petitioners have only one comment. Section 304(b) directs the Administrator to issue regulations providing guidelines for effluent limitations, and if EPA had not chosen to impose upon itself a statutory pattern which, to borrow its own phrase, "totally warps the framework of the Act", it would not now be compelled to resort to invoking Section 501 as justification for improper and unnecessary authority to promulgate regulations under Section 301.

In the total absence of statutory authority to promulgate effluent limitations under Section 301, EPA cites a number of the Act's provisions for the proposition that effluent limitations may be promulgated by the Administrator.[1/] Petitioners agree that all the cited Sections involve or have some relation to various effluent limitations, and there is no disagreement that effluent limitations are a key to the regulatory structure established by the Congress. But none of the sections cited by EPA directly or indirectly supports EPA's contention that effluent limitations are to be promulgated by regulation under Section 301 rather than in Section 402

1/ For Petitioners' response to EPA's argument on Section 509(b)(1)(E) (Resp. Br. at 21), see Section IV, infra, at pages 27-29.

permits with reference to objective guidelines under Section 304(b).

For example, EPA argues that subsections (c), (d), and (e) of Section 301 demonstrate that Congress intended that the Administrator promulgate effluent limitations under Section 301(b). Resp. Br., at 20-21. In fact, those subsections demonstrate the contrary.

Subsection (c) provides that EPA may "modify the requirements of subsection (b)(2)(A)" upon a showing, inter alia, that a modified requirement "will represent the maximum use of technology within the economic capability of the owner or operator." This provision says nothing about promulgation of effluent limitations under Section 301(b)(2). It says that, under specified circumstances, the Administrator may order that a particular plant will not be required to achieve effluent limitations requiring application of best available technology.

Subsection 301(d) provides:

> "(d) Any effluent limitations <u>required</u> by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised <u>pursuant to the procedure established under such paragraph</u>." (Emphasis added)

Subsection (d) refers to "effluent limitations required" by Section 301(b)(2). It does not mention effluent limitations promulgated pursuant to that subsection. Further, the only "procedure established" by paragraph (2) of subsection (b) for revision is the provision that effluent limitations for 1983 shall require the application of best available technology economically achievable "as determined in accordance with regulations issued

by the Administrator pursuant to Section 304(b)(2) of this Act * * *." Thus, the only "procedure" to which subsection (d) can refer is regulation under Section 304.

This becomes all the more apparent in considering the purpose of subsection 301(d) and the provisions of Section 304(b). The purpose of subsection (d), as the Senate Report explained, was to provide for the program after 1981 (1983 in the final bill). Thus, the Committee said (with reference to Section 301(c) which became 301(d) in the final bill):

> "The Committee established a procedure to continue the program beyond 1981. Under this provision, the procedures and requirements of Phase II would be repeated every five years for those sources of pollution which could not have to achieve the no discharge requirement in Phase I (if required to meet water quality standards) or Phase II, or in an earlier five-year phase." (S. Rep. No. 92-414, 92d Cong., 1st Sess. 46 (1971), Leg. Hist. 1464.)

The five-year period was selected because the Senate bill, S. 2770, provided for the best practicable standard to be achieved by 1976 and the best available standard to be achieved by 1981 -- a five-year interval. S. 2770, 92d Cong., 1st Sess. (1971), Leg. Hist. 1608-1610. Furthermore, a permit issued under Section 402 ordinarily has a five-year term. Section 402(a)(3), (b)(1)(B). Thus, subsection (d) was designed to direct the Administrator for each five-year period after 1981 to redetermine by regulations under Section 304 the best available standard for all industries which were not then subject to a no-discharge standard.

Petitioners agree that Congress intended that

EPA's regulations be periodically reviewed and revised, but that is expressly provided for in Section 304. Section 304(b) directs the Administrator to issue regulations providing guidelines for effluent limitations, and "at least annually thereafter, revise, if appropriate, such regulations." The Government's strained interpretation would confine the revision to five-year intervals after 1983 and render the provision for annual review under Section 304(b) utterly meaningless.

Subsection (e) of Section 301 provides:

> "(e) Effluent limitations established pursuant to this section or to Section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."

In the light of subsection (d) the procedure for establishing effluent limitations under 301 is by guideline regulations under Section 304(b) and the application of the guidelines to all point sources under Section 402 "in accordance with the provisions of this Act."

EPA's argument that Section 302(c) "assumes the existence of effluent limitations promulgated under Section 301(b) -- Resp. Br. at 23 (emphasis added) -- rests on amending Section 302(c) to insert the word "promulgated" whereas it actually refers to "effluent limitations required" under Section 301(b)(2), which the Act contemplates are to be implemented through Section 304(b) guidelines and Section 402 permits.

The District Court in the DuPont case (slip op., at 10) and EPA (Resp. Br. at 23) find an implication in

Section 505(f) for an authority to issue regulations under Section 301(b). Section 505(f) defines effluent limitations (for purposes of citizens suits) to mean:

> "(1) effective July 1, 1973, an unlawful act under Section 301 of this Act; (2) an effluent limitation or other limitations under Section 301 or 302 of this Act; . . . or (6) a permit or condition thereof under Section 402 of this Act . . . .

Subsection (2) is redundant, the Court concluded, unless the Administrator can issue limitations under Section 301. Slip op., at 10. But the Court overlooked the fact that Section 301(c) specifically provides for the Administrator to fix limitations under the procedure provided in that section. Section 302 also contemplates promulgation of limitations when the Administrator makes the necessary findings as to water quality.

EPA's argument with respect to Section 316 (Resp. Br. at 23-24) raises a novel, for EPA, proposition. If, as EPA suggests with the bracketed language inserted into the quote from Section 316(a) the effluent limitations are to be promulgated under Section 301 rather than established in permit proceedings under Section 402 to achieve the requirements of Section 301 (Resp. Br. at 24), then EPA has now decided that not only it, but the States, are to promulgate effluent limitations under Section 301 and new source standards under Section 306. Or, perhaps, EPA would prefer to delete from Section 316(a) the phrase "or if appropriate the State".

2. Legislative History.

While Petitioners' opening briefs cited several exerpts from the legislative history of the Act to support the contention that there is no room in the statutory scheme for EPA to set effluent limitations by regulation, there is one additional reference to a passage from Senator Muskie's summary of the Conference Committee's deliberations which clearly, and even emphatically, demonstrates that the permit-issuing authority, whether a State or EPA, is to apply Section 304 guideline regulations in permit proceedings, not regulations establishing limitations under Section 301. This is a view which Respondent backhandedly characterizes as "a misrepresentation" which "totally warps the framework of the Act" (Resp. Br., at 19):

> "NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM" [SECTION 402]
>
> "The Conference agreement provides that the Administrator may review any permit issued pursuant to this Act as to its consistency with the guidelines and requirements of the Act. Should the Administrator find that a permit is proposed which does not conform to the guidelines issued under Section 304 and other requirements of the Act, he shall notify the State of his determination, and the permit cannot issue until the Administrator determines that the necessary changes have been made to assure compliance with such guidelines and requirements." (118 Cong. Rec. S. 16875 (daily ed. October 4, 1972), Leg. Hist. 176 (emphasis in original).)

EPA and the DuPont decision misread the Act's mention of "guidelines and requirements of this Act" in Section 402(d)(2) as a reference to Section 304(h) guidelines for State permit programs, and not to Section 304(b) guidelines. 1/

In contrast, EPA's interpretation is so far removed from the statute that it attempts in its brief to rewrite the legislative history to fit the new interpretation. Thus, EPA's brief (at 27) makes the following quotation from the Senate Report:

> "The program proposed by this Section [301] will be implemented through permits issued in Section 402. The Administrator will have the capability and mandate [by promulgating effluent limitations] to press technology and economics to achieve those levels of effluent reduction which he believes to be practicable in the first instances and attainable in the second." (S. Rep. No. 92-414, 92d Cong., 1st Sess. 42 (1971), Leg. Hist. 1460.)

The underlined words in brackets were added to the quotation by the Government without any explanation or justification.

1/ In addition, in the House, Congressman Podell offered an amendment which would have eliminated State discretion in issuing permits. The amendment was defeated. 118 Cong. Rec. H. 2634-35 (daily ed. March 28, 1972), Leg. Hist. 574-576. Congressman Podell had supported his amendment by complaining that "there are no [Federal] standards but merely guidelines and there is a substantial difference." Id., at H. 2635, Leg. Hist. 576 (emphasis added).

Indeed, these added words are so extraneous that the Government does not even pretend that it is inserting a reference for the Court's convenience. This doctored quotation, the Government says, "shows the implicit interpretation of Congress" that EPA must establish effluent limitations under Section 301. The inconsistency of this doctoring of the legislative history with the remaining legislative history is shown by the colloquy between Senator Muskie (a principal supporter and author of the bill) and Senator Mathias:

> "Mr. Mathias. Does Section 301(b)(2)(A) on page 76 contemplate that a State or the Administrator, if appropriate, might be able to set the 1981 effluent limitations almost on an individual point source by point source basis?"
>
> "Mr. Muskie. Section 301(b)(2)(A), as well as Section 301(b)(1) anticipates individual application of controls on point sources through the procedures under the permit program established under Section 402.
>
> "Mr. Muskie . . . The information under Section 304(b) is to be applied in setting effluent limitations." (117 Cong. Rec. S. 17454 (daily ed. Nov. 2, 1971), Leg. Hist. 1391 (emphasis added).)1/

EPA's brief at pages 26-29 quotes extensively from the legislative history but can point to no part of the history explicitly adopting its view of the Act. While

---

1/ The omitted part of the quotation dealt with a question by Senator Mathias on Section 304(a)(1) relating to water quality.

EPA's brief asserts the legislative history is clear, its argument must depend on "clear implication" (Resp. Br., at 27), "implies" (id.), "what is obvious" (id., at 28), and "implicit interpretation" (id.). The absence of any straightforward reference to regulations under 301 confirms that Congress never contemplated such regulations.

In fact, the Committee Report on the House amendments to S. 2770, the bill that became law, characterized Section 304(b) as requiring "the Administrator . . . to publish . . . regulations for the establishment of effluent limitations," not regulations establishing effluent limitations. H. Rep. No. 92-911, 92d Cong., 2d Sess., at 107 (1972), Leg. Hist. 794 (emphasis added). The Conference Report reiterated the Administrator's role under Section 304(b) as one of promulgating "regulations providing guidelines for effluent limitations," not regulations providing or establishing effluent limitations. S. Rep. No. 92-1236, 92d Cong., 2d Sess., 124-125 (1972), Leg. Hist. 307-308 (emphasis added).

B. EPA Has Sluffed Over Its Violation Of The Administrative Procedure Act.

Petitioners' opening brief pointed out that even assuming arguendo that the Administrator had implied authority to issue effluent limitations by regulation under Section 301(b), EPA's eleventh hour denomination of its regulations

as effluent limitations at the very least constituted rulemaking without notice and by fiat. Pet. Br. in No. 74-1687, at 16-17.[1/] EPA protests that Petitioners conveniently overlooked "references throughout the regulation-setting process to Section 301 as well as Section 304 as legal authority for the actions taken" and that its pronouncement that the nature of the regulations as effluent limitations "is readily obvious." Resp. Br., at 17-18. Even the most casual reading of those references establishes that Section 304(b), and only Section 304(b), was cited by EPA as the legal basis for its regulations.

EPA cites to comments by the industry to conclude that the regulations "obviously" were effluent limitations under Section 301. Resp. Br. at 19. While the industry objected to EPA's single-number proposals as unreasonable and arbitrary, there is no evidence in the record that anyone other than EPA knew that EPA was quietly transforming guidelines under Section 304(b) into effluent limitations under Section 301.

Indeed, three weeks prior to the promulgation of the regulations for the phosphate industry, EPA promulgated general definitional regulations defining "effluent limitations

---

1/ Judge Turk in his opinion in E. I. DuPont de Nemours & Co. v. Train, supra, recognized the notice issue but did not decide it on the ground that the issue should be presented to the Court of Appeals. Slip op., at 18-19(Appendix B).

guidelines" as:

> "any effluent limitations guidelines issued by the Administrator pursuant to Section 304(b) of the Act." (40 C.F.R. §401.11(j), 39 Fed. Reg. 4532 (February 4, 1974) (emphasis added).)

This definition was explicitly incorporated into the phosphate industry regulations. 40 C.F.R. §§422.11, 422.21, and 422.31, App. 1317 and 1318.

EPA has in effect now recognized that it failed to give requisite notice. The preamble to proposed regulations for a subsequent group of regulations, for the Grain Mills Manufacturing Point Source Category, published on September 17, 1974, states: "The regulation proposed herein sets forth effluent limitations and guidelines pursuant to Sections 301 and 304(b) of the Act * * *". 39 Fed. Reg. 33470 (emphasis added). Thus, EPA is now giving the express notice which it failed to give when establishing the phosphate industry guidelines.

IV. EPA'S INTERPRETATION RENDERS IMPORTANT PROVISIONS IN THE ACT REDUNDANT

EPA's interpretation makes significant provisions of Section 509 redundant and meaningless. Section 509(b)(1) provides:

> "(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under Section 306, ... (E) in approving or promulgating any effluent limitation or other limitation under Sections 301, 302, or 306, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person . . . ." (emphasis added.)

Subparagraph (A) provides for review of standards of performance under Section 306 (new sources). The reference in subparagraph (E) to an effluent limitation approved or promulgated under Section 306 can have no meaning if it does not apply to a limitation in a permit. Indeed, the distinction found in Section 509(b)(1) demonstrates that an "effluent limitation or other limitation" in subparagraph (E) must be interpreted to include only the limitation itself, not the standard or guideline from which it came. 1/

1/ One Congressman, Representative Terry of New York, complained about the lack of a special review provision for Section 304 guidelines. In his Statement of Supplemental Views to the House Report, he said:

> "Section 509, which deals with administrative review

continued on page 28 .

EPA states that Petitioners' position that "promulgating" refers only Sections 302 and 306 and "approving" only relates to the Administrator's veto power over a state-proposed permit under Section 402(d)(2) is "specious" because "[i]t ignores the language" of Section 301(b)(1)(C). Resp. Br., at 21-22. Section 301(b)(1)(C), contrary to Respondent's editorializing, does not authorize the Administrator to promulgate effluent limitations but, as with the Section 301(b)(1)(A) and (B) limitations, directs that they "shall be achieved". Further, these limitations, like their counterparts under Section 301(b)(1)(A) and (B), are obviously to be achieved by inclusion as conditions in Section 402 permits, not by

---

1/ continued from page 27.

> procedures, requires an application to U.S. District Court within 30 days of EPA determinations subject to review. Here administrative reviews is [sic] possible, but the time allowed is much too short. It is my feeling that the time allowed should be doubled. Many other significant areas in the legislation where the administrator has a great deal of discretionary action are, however, without such review. These include Section 204, the construction grant limitations and conditions, Section 303, the water quality standards and implementation plans, Section 304, the Federal guidelines, and Section 402, the permit program.
>
> "Since the permit program is fundamental to implementation of the Act, and guidelines promulgated by EPA under Section 304 are key to the pollution control conditions for discharge under the permits whether issued by EPA or by a state after EPA approval of a State program, an administrative review procedure of Section 304 guidelines, prior to their promulgation, and EPA approval or disapproval of State permit programs is essential. Otherwise, the so-called primary State role is not meaningful." (H. Rep. No. 92-911, 92d Cong., 2d Sess. 424 (1972), Leg. Hist. 892).

their unauthorized promulgation as regulations by the Administrator. Thus the 301(b)(1)(C) limitations, like those under Section 301(b)(1)(A) and (B), are subject to "approval" by the Administrator under his veto power of state-issued permits.[1/]

P A R T T H R E E

I. THE REGULATIONS MUST BE SET ASIDE AND REMANDED

EPA has conceded that it erred in establishing the effluent guidelines for phosphorus pentasulfide (1977), phosphorus oxychloride and phosphorus trichloride (1983), foodgrade sodium tripolyphosphate (1977 and 1983), and foodgrade calcium phosphate (1983) facilities. These regulations, therefore, must be set aside and remanded.

EPA also agrees that it must modify its definition of "process waste water".[2/] The only specific effluent guidelines which EPA defends are the 1977 and 1983 effluent guidelines for elemental phosphorus plants and the 1983 effluent guideline for phosphorus pentasulfide plants. EPA arguments on the 1983 effluent guidelines for elemental phosphorus and phosphorus pentasulfide plants and its views on the definition of "process waste water" as applied to the effluent guidelines are

---

1/ Section 303 (Resp. Br. at 21-22) sheds no light whatsoever on the meaning of the term "approving" in Section 509(b)(1)(E). Section 303 is not mentioned in Section 509(b)(1)(E) or anywhere else in Section 509.

2/ EPA, however, has not even tried to explain why the 1977 effluent guidelines for phosphorus plants restrict discharges of "pollutant or pollutant properties" rather than process waste water pollutants. Pet. Br. in No. 74-1687, at 38.

substantially identical to those in its brief in No. 74-1683 on the new source standards of performance. To avoid duplication Petitioners will not repeat in this reply brief the arguments made in their reply brief in No. 74-1683. For the reasons stated in the brief in No. 74-1683:

(1) the effluent guideline regulations for the phosphate industry must be set aside and remanded for reconsideration by EPA in light of its promise to amend the definition of "process waste water";[1/]

(2) the 1983 effluent guidelines for elemental phosphorus plants must be set aside and remanded;[2/]

(3) the 1983 effluent guidelines for phosphorus pentasulfide plants must be set aside and remanded.[3/]

II. THE 1977 EFFLUENT GUIDELINES FOR ELEMENTAL PHOSPHORUS PLANTS MUST BE SET ASIDE AND REMANDED

A. The Agency Must Reconsider The Guidelines In Light Of Its Recognition Of The Need For Amendments Relating To Rainfall Runoff And Net-Gross Policy.

EPA describes Petitioners' concern about whether the guidelines will be applied on a net or a gross basis as "spurious" and, yet, admits the need for amendments to the regulations (which were proposed after Petitioners' brief was filed). Resp. Br. at 60-61. The Agency also concurs that the regulations must be amended to make allowance for discharges "attributable to inordinate periods of precipitation."

1/ Petitioners' Reply Brief in No. 74-1683, at 7-10.

2/ Petitioners' Reply Brief in No. 74-1683, at 10-16.

3/ Petitioners' Reply Brief in No. 74-1683, at 16-23.

Resp. Br. at 71. The 1977 effluent guidelines for phosphorus plants should be set aside and remanded to the Agency for reconsideration in light of the promised regulations on net-gross policy and stormwater discharges.

B. EPA's Recently Found "Averaging Technique" Does Not Support The 1977 Guidelines.

EPA's defense of the 1977 phosphate and fluoride effluent guidelines for elemental phosphorus plants is that those effluent guidelines are based on an average of data from three plants -- Monsanto at Columbia (Plant 028), Monsanto at Soda Springs (Plant 059), and Hooker at Columbia (Plant 181). Resp. Br. at 57, 58 and 60. Petitioners are accused of "conveniently" forgetting about the Hooker plant. EPA further suggests that it did not really accept the ESQWIAC recommendations. Resp. Br. at 55.

Nowhere are the consequences of EPA's insatiable appetite for single numbers more obvious. The issue is not, as stated by EPA, whether a post-promulgation search can turn up a technology that allows the guidelines to be achieved. Resp. Br. at 59. The critical mandate of the Congress is that industrial dischargers meet by mid-1977 effluent limitations which "require application of best practicable control technology currently available". Section 301(b)(1)(A). The question which EPA must address in establishing the guidelines is whether they are consistent with application of best practicable control technology currently available. By EPA's own findings, they are not.

EPA in the Preamble to the Final Regulations (App. 1315 and 1316), EPA in the Development Document (App. 1772) and EPA in its brief (Resp. Br. at 56, 57 and 58) has repeatedly conceded that the two Monsanto plants are exemplary and that they employ best practicable control technology currently available. Yet, EPA promulgated effluent guidelines which neither plant meets.

What EPA should have done, as recommended by ESWQIAC, is to establish a range of effluents levels representing the application of best practicable control technology as demonstrated by the Monsanto and Hooker facilities. Integral to the guideline should have been an objective elucidation of the factors set forth in Section 304(b)(1)(B) based on a sound technical analysis of the considerations (nature of technology, climate, etc.) which differentiate among the three plants as to the effluent levels achievable by best practicable control technology. With this guideline in hand, the permit-issuing agency would have the basis contemplated by the Act for ensuring that a phosphorus plant similarly situated to the Hooker plant would meet effluent levels demonstrated by Hooker and a plant similarly situated to the Monsanto Soda Springs plant would meet effluent levels demonstrated by Monsanto.

In both instances, the plants would, as directed by the Act, be required to apply best practicable control

technology. Instead, EPA has taken legislative history indicating that the guidelines should be a range of effluent levels based on reference to the best performers in an industry and turned it into a meaningless exercise in arithmetic averaging with the result that the plants on which the guidelines are supposedly based will have to go beyond the statutory requirement of best practicable control technology.

EPA's explanation that it averaged the data for the Hooker and Monsanto Plants is most disquieting for additional reasons. The computation of the guidelines now offered by EPA in its brief is, of course, nowhere to be found in the record.

In fact, EPA's statement of the rationale for the effluent guidelines in the preamble to the final regulations is directly contrary to that in its brief:

> "The ESQWIAC limits include two additional phosphorus plants [the Monsanto facilities] * * * and [EPA] has allowed a discharge based on data in the Development Document for the treatment capabilities for <u>these</u> plants. * * * [T]he data in the Development Document does support the <u>specific limits</u> proposed by ESWQIAC." App. 1315 (emphasis added).
>
> "The limitations are based upon <u>two plants</u> that discharge process waste water from treatment plants that exhibit exemplary performance." App. 1316 (emphasis added).

Even if, as suggested by EPA in its brief, Petitioners somehow should have ignored EPA's proclamation that it "was basing the guidelines solely upon the two Monsanto plants or on the numbers proposed by ESWQIAC" (Resp. Br. at 58), Petitioners are left with the problem that EPA's present arithmetic does not work. Adding zero (for Hooker) to the data for the Monsanto plants and dividing by three comes no closer to rationalizing the effluent guidelines actually promulgated than adding the data for the Monsanto plants and dividing by two: 1/

	Effluent Guideline	Hooker (Columbia)	Monsanto (Columbia)	Monsanto (Soda Springs)	Average (Three Plants)	Average (Monsanto Plants)
Fluorides	.05	0	.1	.04	.05	.07
Phosphates (as P)	.15	0	.039 2/	.26	.10	.15
Total Suspended Solids	.5	0	.54	.54	.35	.52

1/ Petitioners never suggested that the fluorides guideline was based on the average of the Monsanto plants. Pet. Br. in No. 74-1687, at 43.

2/ EPA, in its brief, apparently used the .2 pounds phosphates (.065 pounds when converted to phosphates as P) per 1000 pounds of product (Resp. Br. at 57) included in Table 13 (App. 1737). It appears that the correct effluent phosphate level for Monsanto's Columbia plant is the .12 pounds total phosphates (.039 pounds as P) in Table 14 (App. 1738) and that the phosphate number in Table 13 apparently was rounded off. However, even assuming that EPA played its averaging game with the higher phosphate number, it is evident that EPA's guideline of .15 pounds probably came from the average of the Monsanto plants (.16 pounds) rather than the average for three plants (.11 pounds).

Petitioners have underlined the averages which most closely resemble EPA's effluent guidelines (including that for total suspended solids even though it is not at issue in this case) to demonstrate that, if EPA engaged in an averaging game as stated in its brief, the rules of the game inexplicably varied depending on the pollutant parameter.

CONCLUSION

For the reasons stated above, the Court should rule that it is without jurisdiction to review the effluent guideline regulations. Should the Court determine that it has jurisdiction, the regulations should be set aside and remanded.

Respectfully submitted,

OF COUNSEL:

CLEARY, GOTTLIEB,
STEEN & HAMILTON
1250 Connecticut Avenue, NW
Washington, D.C. 20036

December 19, 1974

ROBERT C. BARNARD
DOUGLAS E. KLIEVER
HENRY J. PLOG, JR.
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 223-2151

ATTORNEYS FOR PETITIONERS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN PAPER INSTITUTE,

Plaintiff,

v.

RUSSELL E. TRAIN, as Administrator, Environmental Protection Agency,

and

JOHN R. QUARLES, as Deputy Administrator, Environmental Protection Agency,

Defendants.

Civil Action No. 74-814

FILED

SEP 20 1974

JAMES E. DAVEY, Clerk

ORDER

The Motion to Dismiss filed by the defendants in this action is GRANTED, and the action is hereby DISMISSED, on the ground that the regulations challenged by the plaintiff in this suit are effluent limitations which, pursuant to Section 509 of the Federal Water Pollution Control Act Amendments of 1972, are subject to review only in United States Courts of Appeals.

Judge

18 Sept 74
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN PAPER INSTITUTE
Plaintiff

v.

RUSSELL TRAIN, et al.
Defendants

Civil Action No. 74-814 ~~1703-73~~

MEMORANDUM OPINION

Plaintiff brought this action to set aside certain regulations setting forth water pollution effluent limitations guidelines and standards of performance for the pulp, paper and paperboard industries. These regulations were published pursuant to the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA" or "the Act"); Pub.L. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 et seq. (October 18, 1972)[1/]

The precise issue is whether this Court has jurisdiction to review the regulations in question. Plaintiff contends that the challenged regulations are reviewable in this Court pursuant to the Administrative Procedure Act ("the APA"), 5 U.S.C. 555 et seq. Defendants maintain that the regulations are effluent limitations issued pursuant to § 301 of the Act, 33 U.S.C. § 1311.

1/ Regulations under challenge were promulgated by EPA at 40 C.F.R. §§ 430.10 through 430.56, 39 Fed.Reg. 18742 (May 29, 1974) and at 40 C.F.R. §§ 401.10 through 401.12, 39 Fed.Reg. 4537 (February 4, 1974) insofar as they are applicable to 40 C.F.R. §§ 430.10 through 430.56 and are therefore reviewable only by a Court of Appeals, pursuant to § 509(b)(1) of the Act, 33 U.S.C. § 1369.

Plaintiff's argument appears to be that the regulations in question are guidelines issued pursuant to § 304(b) of the Act, 33 U.S.C. § 1314(b) or that, if not guidelines, are void limitations promulgated erroneously in the stead of guidelines. In either event, plaintiff claims these regulations are reviewable in this Court under the provisions of the APA (Section 10(a)). Assuming arguendo that the regulations are guidelines only, or guidelines divisible from limitations for purposes of review, we hold that this Court does not have jurisdiction to review.

The FWPCA at § 304(b) provides for the promulgation of guidelines as an aid to the establishment of effluent limitations standards of performance for existing point sources, such limitations to be promulgated for use in the permit issuance mechanism to be put in effect no later than July 1, 1977. See 33 U.S.C. §§ 1311 and 1314(b). Since guidelines are only an aid in establishing effluent limitations and since limitations, not guidelines, comprise the standards of performance for the issuance of permits, plaintiff cannot be heard to complain that it is "adversely affected or aggrieved" by guidelines, the criteria of Section 10(a) of the APA. If these regulations are limitations, which this Court holds they in fact are, § 509 of the FWPCA provides for review by a United States Court of Appeals and not by a United States District Court. We therefore lack subject matter jurisdiction.

As to whether review of these regulations might be had in this Court as well as the Court of Appeals -- the law is clear

that "when Congress has specified a procedure for judicial review of administrative action, courts will not make nonstatutory remedies available without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review. . . ." Nader v. Volpe, 151 U.S. App. D.C. 90, 95, 466 F.2d 261, 266 (1972). Accordingly, plaintiff's complaint is dismissed for the jurisdictional reason already set forth. An order consistent with the foregoing has been entered this date.

John H. Pratt
United States District Judge

September 18, 1974

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

E. I. DuPONT DE NEMOURS and COMPANY, et al,) CIVIL ACTION NO. 74-57

Plaintiffs,) OPINION and ORDER

v.) BY: James C. Turk, Chief U. S. District Judge

RUSSELL E. TRAIN, et al,)

Defendants.)

This suit is brought by eight chemical manufacturers seeking declaratory and injunctive relief against the Administrator and Deputy Administrator of the Environmental Protection Agency (EPA). The case is presently before the court pursuant to plaintiffs' motion for partial summary judgment and declaratory judgment and the defendants' motion to dismiss for lack of subject matter jurisdiction or alternatively to stay the proceedings.

Plaintiffs ultimately seek to have this court enjoin and set aside certain regulations promulgated by the Administrator of the EPA governing the effluent discharge of sulfuric acid plants on grounds that they are arbitrary, capricious, not supported by substantial evidence, beyond the statutory authority of EPA and not in accord with procedures of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq ("The Act") and the Administrative Procedure Act. Resolution of these allegations requires factual determinations and they are accordingly not now ripe for disposition. However, plaintiffs also raise several issues of statutory construction not dependent upon factual determinations and which may result in the disposition of the case at this time. The following issues are now before the court for resolution:

1. Whether the Administrator of the EPA has the authority under section 301(b) of the Act to issue regulations establishing effluent limitations for sulfuric acid plants;

2. Whether the regulations in question conform to section 304(b) of the Act and the notice and public participation provisions of the Administrative Procedure Act; and

3. Whether this court has jurisdiction to review the regulations in question and the procedures by which they were promulgated, or whether as defendants contend, this suit should be dismissed for lack of subject matter jurisdiction.

THE STATUTE

The Federal Water Pollution Control Act Amendments of 1972, while technically amending the Federal Water Pollution Control Act of 1965, 33 U.S.C. §§ 1151 et seq, is in effect a comprehensive statute in its own right. Section 101(a) of the Act states as its objective "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," and states as two of its goals "that the discharge of pollutants into the Navigable waters be eliminated by 1985" and "that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." Of primary interest to this suit are sections 301, 304 and 402, which establish the regulatory framework for achieving the above goals and section 509(b)(1) providing for judicial review of the Administrator's actions.

Section 301(a) makes it unlawful for any person to discharge any pollutant except as in compliance with certain enumerated sections of the Act including section 301. Section 301(b) then states:

"In order to carry out the objective of this Act, there shall be achieved--

"(1) (A) not later than July 1, 1977, effluent limitations for point sources... (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act....

"(2) (A) not later than July 1, 1983, effluent limitations for categories and classes of point sources...which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act...."

Section 304(b) to which section 301(b) refers provides:

"For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall--

"(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources; and

"(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources...within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of application of

technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

"(2)(A) identify, in terms of amounts of constitutents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources...; and

"(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source... within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

"(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants."

The statutory scheme further provides for a national system of discharge permits known as the "National Pollutant Discharge Elimination System" (NPDES) to insure that the control levels established by the Act are achieved. Thus, section 402(a)(1) states:

"Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for a public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of the Act."

Section 402(b-e) further provides that the permit issuing authority be given to the individual states which submit a program which meets the requirements of the Act, although the Administrator retains the power to prevent the issuance of a permit he deems to be "outside the guidelines and requirements of this Act." § 402(d)(2).

Section 509(b) provides for judicial review of the Administrator's determinations:

> "(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(c), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307, (D) in making any determination as to a state permit program submitted under section 402 (b), (E), in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance, or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.
>
> "(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

THE REGULATIONS

On August 6, 1973, the EPA published notice of proposed rulemaking "with respect to effluent limitations guidelines, standards of performance and pretreatment standards for new sources." 38 Fed. Reg. 21202. On October 11, 1973, EPA published notice of proposed rulemaking for 40 C.F.R. Part 415, "Effluent Limitations Guidelines and Standards of Performance and Pretreatment for Inorganic Chemicals Manufacturing Point Source Category." 38 Fed. Reg. 28174 et seq. These proposed regulations subdivided the inorganic chemicals manufacturing category into twenty-two sub-categories, each representing a different chemical, including sulfuric acid. With respect to sulfuric acid, the

proposal discussed the three principal methods of manufacture - double absorption plants, single absorption plants and spent acid plants - and stated that the proposed regulations would not apply to spent acid plants. However, the proposed regulations for both single and double absorption plants established the standard of "no discharge of process waste water pollutants to navigable waters" both "after application of the best practicable control technology currently available" and "after application of the best available technology economically achievable." 38 Fed. Reg. 28192. After receiving additional comments, including comments from seven of the plaintiffs to this suit, 39 Fed. Reg. 9612, final regulations were issued on March 12, 1974 for 40 C.F.R. Part 415 (Inorganic Chemicals Manufacturing Point Source Category). The Administrator declined to change the basic proposed regulations for sulfuric acid production, and the "no discharge of process waste water pollutants" went into effect. 40 C.F.R. §§ 415.212, 415.213, 39 Fed. Reg. 9634. The proposed regulations for sulfuric acid production (as well as other subcategories in the Inorganic Chemicals Manufacturing Group) were modified with regard to the limitations representing best practicable control technology currently available (40 C.F.R. § 415.212), by providing that the "no discharge" standard might be adjusted for certain plants by the Regional Administrator or the State in issuing an NPDES permit; according to the regulation, such an adjustment could be made on the basis of a showing that certain factors peculiar to the discharger are "fundamentally different" than the factors considered in formulating the regulation. 40 C.F.R. § 415.212, 39 Fed. Reg. 9634.

I

Plaintiffs' statutory construction argument is essentially that the regulations for sulfuric acid plants are not valid effluent "guidelines" complying with the requirements of section 304(b). They contend that the word "guidelines" in section 304(b) is a term of art which contemplates the administrative promulgation of broadly outlined regulations to serve as a starting point for the development of specific restrictions which would then be individualized for each discharger by way of permits issued by the Regional Administrator or State pursuant to § 402 with such permits embodying the "limitations" to be "achieved" pursuant to § 301. In support of this construction plaintiffs note that § 304(b) requires that the guidelines to be published as regulations contain two elements: (1) the degree of effluent reduction "attainable" by 1977 using the "best practicable control technology currently available" and by 1983 using the "best available control measures and practices achievable" for classes and categories of point sources; and (2) a specification of the factors to be taken into account in determining the control measures applicable to point sources within such categories or classes in order to attain these goals. Thus plaintiffs argue that the regulations were intended to be flexible guidelines and not prescriptive rules applicable across the board to all plants in a given category (i.e. sulfuric acid plants); and the permit granting agency would look to the guidelines for determining the degree of effluent limitation attainable for a given plant.

Plaintiffs' specifically contend that the regulations for sulfuric acid plants fail to discuss the statutory factors and hence provide no guidance to the permit-granting authorities. Furthermore, they contend that the EPA's construction and implementation of the Act would frustrate the intent of Congress in allowing the States to play a major role in implementing the Act. They argue that by making the

regulations binding prescriptions in the form of specific limitations instead of a "range" of discharge levels together with factors to be taken into account for discrete industrial categories, the EPA has deprived the States of discretion in administering the NPDES program. This is said to be contrary to the intent of Congress expressed in § 101(b) of the Act "to recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution...."

Based on their construction of the Act, plaintiffs then contend that review in the Court of Appeals pursuant to § 509(b)(1) of the Act is not available to challenge the regulations constituting effluent guidelines under § 304(b). Since § 509(b) provides only for review of EPA actions under sections 301, 302, 306, 307 and 402 of the Act, review of other regulatory actions by the EPA as well as certain other agencies empowered to act under the Act would proceed under the Administrative Procedure Act, 5 U.S.C. § 702, through other jurisdictional statutes such as the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361.[1] Thus plaintiffs argue that review of §§ 304(b) guidelines is not encompassed by § 509(b). In support of this position, plaintiffs point out that each of the sections specified in § 509(b) allow regulatory actions by the EPA which may then be enforced by the Administrator pursuant to § 309 or by "any citizen" pursuant to § 505 by way of a civil suit in the district court. They argue that actions taken pursuant to sections not specified in § 509(b), including guidelines issued pursuant to § 304(b), require further implementing steps, and hence a decision of broad precedential effect by a Court of Appeals was not deemed necessary in the first instance.

In contrast, defendants contend that the Act contemplates that the Administrator promulgate actual effluent limitations which will then be uniformly applied by the Administrator or the states in issuing NPDES permits under section 402. According to their construction, section 304(b) guidelines have no direct relationship to permit proceedings under section 402, but merely provide a basis for establishing the effluent limitations. They accordingly argue that the regulations are effluent limitations properly established pursuant to section 301(b).

Defendants view the regulations in question, 45 C.F.R. §§ 415.212, 415.213, as valid effluent limitations promulgated pursuant to section 301(b) with the fixed number of zero for the discharge of process waste water from sulfuric acid plants being the established limitation. In addition they contend that 45 C.F.R. Part 415 establishes the "guidelines" required by section 304(b) by subdividing the inorganic chemical manufacturing group into 22 subcategories of specific chemicals[2]. Thus defendants contend that the regulations are "guidelines" issued pursuant to section 304(b) by way of subcategorization, but are effluent limitations in terms of the specific numerical restrictions imposed.

On the basis of this construction, defendants argue that jurisdiction to review the regulations is exclusively in the Court of Appeals pursuant to section 509(b)(1)(E). Furthermore, it is asserted that since the "guidelines" are intertwined with and provide a definitional basis for the limitations, they should also be reviewed in the Court of Appeals.

II

The issue of statutory construction presented in this case is one of first impression[3] in which the court must seek the intent of Congress from the words and structure of the statute and its legislative history. Although the varying interpretations of the Act presented by the parties both find support in the statute

and its history, for the reasons which follow the court concludes: (1) that the Administrator was authorized to promulgate by regulation the effluent limitations in issue; (2) that the structural and content requirements of such regulations under section 304(b) were satisfied; and (3) that judicial review of these limitations and guidelines is exclusively in the Court of Appeals under section 509(b)(1)(E).

1.

Taken as a whole, the various sections of the Act support the defendants' construction that section 301(b) effluent limitations were intended to be promulgated as regulations apart from section 402 permit proceedings. This is implicitly supported by section 509(b)(1)(E) which provides for review of the Administrator's actions "in approving or promulgating any effluent limitation under section 301, 302, or 306...." The independence of such limitations is also implicit in section 505 which provides in subsection (a) for any citizen to sue for a violation of "an effluent standard or limitation under this Act"; but even more revealing is section 505(f) which defines "effluent standard or limitation under this Act" to include six separate definitions among which are: "(1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act, (2) an effluent limitation or other limitation under section 301 or 302 of this Act; ..." or (6) a permit or condition thereof issued under section 402 of this Act...." Obviously under plaintiffs' construction of the Act the second definition quoted above would be redundant with the sixth. Plaintiffs have offered no explanation for this apparent inconsistency with their position.

Plaintiffs would avoid the implication of section 509(b)(1)(E) by construing the word "promulgating" in section 509(b)(1)(E) as applying only to section 302 and the word "approving" as having application to effluent limitations under sections 301 or 306. In support of this construction, plaintiffs point out that section 402(b) allows a state to develop a plan for issuing permits and thus displace

the Administrator's authority to issue permits; and further that section 402(d) provides a check on the states by allowing the Administrator to veto a permit issued by the state:

> "(d)(1) Each state shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.
> "(2) No permit shall issue...(b) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act. (plaintiffs' emphasis).

From these sections, plaintiffs argue that the use of "approving" in section 509(b)(1)(E) was in reference to the Administrator's action in reviewing effluent limitations under section 301(b) or standards of performance under section 306[4] which would be set by the States in permits. They further contend that such approval was a necessary element inasmuch as such a federal connection to a state program was necessary in order to justify review in the federal courts. On the other hand, plaintiffs argue that section 302[5] provides for the promulgation of effluent limitations by the Administrator in certain defined situations without a provision for state implementation. This is said to explain the use of "promulgating" in section 509(b)(1)(E).

Such a construction of section 509(b)(1)(E) is unconvincing for several reasons. First, section 302 does not require that effluent limitations be "promulgated"; rather it states that "effluent limitations...shall be established." The court fails to see a distinction between the establishment of limitations under section 302 and the achievement of limitations under section 301(b) particularly in view of the language used in section 301(e):

> "Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."

Similarly section 302(c) provides:

> "The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 301 of this Act."

Second, plaintiffs' construction of the interrelationship between section 509(b)(1)(E) and section 402(d)(1) and (2) ignores the fact that sections 402(d)(3), 402(e) and 402(f) allow the Administrator to waive review of permits issued by the States, and thus in such situations, by plaintiffs' analysis, there would be no federal judicial review under section 509(b)(1). Finally, the reference to "guidelines and requirements of this Act" in section 402(d)(2) would appear to section 304(h) guidelines[6] (as opposed to section 304(b) guidelines) in view of the references to "guidelines" in sections 402(b), 402(c)(1), and 402(c)(2) and 402(e) being specifically to section 304(h) guidelines.

Even more strongly suggestive of the conclusion that section 301(b) limitations were intended to be promulgated as regulations is the interrelationship between section 301(b) and 304(b). Thus the requirements of sections 304(b)(1)(A) and 304(b)(2)(A) that the Administrator publish regulations which identify the degree of effluent reduction attainable by 1977 and 1983 appears to contemplate the issuance of actual effluent limitations which are referred to in section 301(b)(1)(A) as being "defined by the Administrator pursuant to section 304(b) of this Act" and in section 301(b)(2)(A) as being "determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act...."

Both plaintiffs and defendants quote the definition of effluent limitation in section 502(11) in support of their respective interpretations of the Act:

> "The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance. "

Plaintiffs argue that since a state cannot issue regulations the definition indicates that effluent limitations do not involve regulations and that the definition contemplates that both the states and the EPA will have a shared role in establishing effluent limitations. However, the court does not perceive this definition as being inconsistent with the defendants' construction of the Act and the regulations herein challenged since the effluent limitations promulgated by the Administrator may nevertheless be "established" for a given discharger through a permit issued by a state which has satisfied the requirements of section 402.

Further support for the conclusion that NPDES permits issued pursuant to section 402 would embody the effluent limitations previously established by the Administrator is implicit in the fact that section 402(a) requires that such permits meet the "applicable requirements under section 301" but omits any reference to section 304(b) guidelines.

As noted, the regulations herein challenged establish the number of zero as the effluent limitation for both single and double absorption plants. The court is of the opinion from a consideration of the structure and wording of the Act that the Administrator had the authority to promulgate such limitations under section 301(b) pursuant to his authority under section 304(b). It follows that plaintiffs' substantive challenge to such limitations must be brought in the Court of Appeals pursuant to section 509(b)(1)(E).

2.

Plaintiffs further challenge the regulations in question for failing to specify the factors to be taken into account in

determining the control measures and practices to be applicable to point sources within such categories or classes, as required by section 304(b)(1)(B) and 304(b)(2)(B). As noted, defendants argue that the subcategorization in effect establishes "guidelines" under section 304(b). They contend that variations in plant age, size, manufacturing processes, raw materials etc. (section 304(b)(1)(B) and 304(b)(2)(B) factors) were taken into account by such subcategorization. They further argue that this approach is consistent with the statutory scheme and facilitates the achievement of reasonably uniform limitations for similar point sources under section 301 of the Act.

The court notes that although the factors were not set forth as regulations as such, the regulations do indicate that the factors were considered. The regulations in question also indicate that the effluent limitations established could be varied for an individual discharger in an NPDES permit upon a showing "that factors relating to the equipment or facilities involved, the processes applied or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines...." 39 Fed. Reg. 9634; 45 C.F.R. § 415.212. In addition, defendants assert (and the regulations note) that the factors in question are analysed in a "Development Document."

In view of the aforementioned conclusion that sections 301(b) and 304(b) intend that the Administrator will publish effluent limitations for classes and categories of point sources, the court is of the opinion that the approach taken by the Administrator in specifying factors is in accord with section 304(b). In this regard it must be noted that the factors required to be specified under section 304(b) were not intended to exist in a vacuum. Rather, both sections 304(b)(1)(B) and 304(b)(2)(B) respectively require such factors in reference to "the assessment of best practicable

control technology currently available to comply with subsection (b)(1) of section 301" and "the best measures and practices available to comply with subsection (b)(2) of section 301". Thus the statute appears to contemplate the incorporation of such factors in the effluent limitations established under section 301, which was apparently done in this case. Accordingly, the court believes that any challenge to the Administrator's consideration of various factors or the weight given to each, like the challenge to the actual numerical limitations, is in essence a challenge to the Administrator's action in promulgating effluent limitations under section 301 and must be pursued under section 509(b)(1)(E) in the Court of Appeals.

The court further is of the opinion that section 509(b) is consistent with the above construction of the Act. It is reasonable to assume that by providing original judicial review in the Courts of Appeals of effluent limitations under section 509(b) along with strict time limitations and prohibitions on review by way of criminal or other civil proceedings, Congress sought to establish expeditious and consistent application of limitations.[7] However, by plaintiffs' construction of the Act, actual effluent limitations would always be individualized for dischargers in NPDES permits, thus limiting the broad precedential effect of any judicial decision approving or rejecting any such limitation. Furthermore, if plaintiffs could challenge section 304(b) guidelines in the district court and section 301(b) limitations in the Courts of Appeal, this would create duplicitous litigation because of the close interrelationship between these sections and the fact that the administrative record in each suit would be virtually identical. In addition, any successful challenge to guidelines in the district court would affect the limitations which could only be challenged in the Courts of Appeal and would thus hinder the goal of prompt judicial review.

The legislative history of the Act is generally consistent with the stated conclusions concerning the relationship between sections 301, 304 and 402 and the Administrator's authority to establish the effluent limitations in issue. Both the House Report accompanying H.R. 11896 and the Senate Report accompanying S. 2770 indicate that the Administrator is to establish specific effluent limitations for subcategories of point sources. Thus the House Report stated:

> "As required in section 304(b)(1)(A), the Administrator, by regulations, is to identify the degree of effluent reduction attainable by the application of the best practicable control technology currently available for classes and categories of point sources. By this the Committee expects that the Administrator will concentrate on, but not be limited to, those categories of point sources enumerated in section 306(b)(1)(A) and any which the Administrator might add to that list. The Committee expects that the identification will be in objective terms and will set out actual performance levels for the classes and categories of point sources rather than prescribing specific control techniques, processes or equipment." H. Rep. No. 92-911, 92d. Cong., 2d Sess., 107 (1972), reprinted in Senate Committee on Public Works, Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess., at 794 (1973) (hereinafter "Legislative History"). (emphasis added).

The Senate Report similarly indicates that effluent limitations will be established by regulations, and in addition indicates that the defendants' approach in incorporating factors into such limitations is consistent with the statutory scheme.

> "It is the Committee's intention that pursuant to subsection 301(b)(1)(A), and Section 304(b) the Administrator will interpret the term 'best practicable' when applied to various categories of industries as a basis for specifying clear and precise effluent limitations to be implemented by January 1, 1976. In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the

> age of the plants, their size and unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. In no case however, should any plant be allowed to discharge more pollutants than is defined by that base level." S. Rep. No. 92-414, 92d Cong., 1st Sess. p. 50; Legislative History at 1468. (emphasis added).

Plaintiffs argue that the reference to the Administrator establishing a "range of discharge levels" supports their construction of the Act. However, by creating narrow subcategories of point sources subject to different limitations, the Administrator has in effect created a range of discharge levels for various categories of point sources--in this case the category being inorganic chemicals manufacturing. In any case, the determination herein challenged set the limitation of "no discharge of process waste water" for two types of sulfuric acid plants, indicating that in the Administrator's opinion a range of numbers was inappropriate. Whether the substance of this decision was correct is, as noted above, to be challenged under section 509(b)(1)(E) in the Court of Appeals.

In the Conference Report on S. 2770 the following was stated with respect to section 304(b):

> "In determining the 'best available technology' for a particular category or class of point sources, the Administrator is directed to consider the cost of achieving effluent reduction. The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of application of an effluent limitation to an individual point source within such a category or class.
>
> "Except as provided for in section 301(c) of the Act, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.

> "The Conferees have provided, however, a mechanism for individual point source-by-source consideration in section 301(c). That section provides that the Administrator may modify any effluent limitation based on 'best available technology' to be achieved by July 1, 1983, with respect to any point source, upon a showing by the owner or operator of such point source that an effluent limitation so modified will represent the maximum use of technology within the economic capability of the operator and will result in reasonable further progress toward the goal of the elimination of the discharge of pollutants." 118 Cong. Rec. S. 16874 (daily ed., Oct. 4, 1972; Legislative History at 172. (emphasis added).

This quotation appears to be basically consistent with defendants interpretation of the Act. Specifically it supports the defendants' construction that section 304(b) factors may be utilized to create subcategories subject to uniform, specific effluent limitations and refutes plaintiffs' contention that such factors are to have an independent status for the purpose of establishing discharge levels for individual plants.

4.

Plaintiffs have raised a final contention concerning the promulgation of the regulations in question which is a concomitant to their other allegations based on their construction of the statute. They argue that in issuing the regulations for inorganic chemicals, the Administrator failed to adhere to the notice and opportunity-to-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. There is apparently no dispute that notice of proposed rulemaking was published in the Federal Register on August 6, 1973 (38 Fed. Reg. 21202) and October 11, 1973 (38 Fed. Reg. 28174) and extensive comments were received from the public, including the plaintiffs. The final regulations issued on March 12, 1974 summarized the major comments received since October 11 notice of proposed rulemaking.

The plaintiffs now contend however that they approached the proposed regulations on the assumption that such regulations would be flexible "guidelines" issued under section 304(b) and not actual effluent limitations to be mechanically applied to all plants in a given subcategory. Thus they argue that by promulgating actual effluent limitations, the Administrator rendered ineffective the notice and public participation requirements of the APA.

Although the record before the court tends to belie plaintiffs' allegations of surprise and prejudice, the court does not now decide this claim. Rather, the court is of the opinion that in view of its construction of the Act, supra, review of this procedual claim should also proceed in the Court of Appeals. Section 509(b)(1)(E) provides for jurisdiction in the Court of Appeals to review "the Administrator's action" in "promulgating any effluent limitation or other limitation under section 301." This jurisdictional section is unqualified, and the court perceives no reason why review of the adequacy of notice and public participation regarding regulations which establish effluent limitations, should not proceed in the same manner as a suit challenging the substantive action of the Administrator in setting particular limitations.

To summarize, the court concludes that the regulations herein challenged are effluent limitations established by the Administrator pursuant to section 301(b) and 304(b); and that review of both the substance of such limitations and the procedures utilized in establishing the same is exclusively in the Court of Appeals pursuant to section 509(b)(1)(E). Accordingly, for the reasons stated defendants' motion to dismiss this suit for lack of subject matter jurisdiction is hereby granted.

DATED: This 27 day of September, 1974.

Chief U. S. District Judge

F O O T N O T E S

1. As a basis for jurisdiction to review what they consider to be section 304(b) "guidelines" plaintiffs also cite 28 U.S.C. §§ 1331, 1332, 1337 and 1651; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

2. The Administrator's approach was explained in the regulations as follows:

> The approach taken in developing effluent limitations guidelines and standards of performance for the inorganic chemicals manufacturing industry was to examine all variables and segment the industry into workable subcategories consistent with these variations. Twenty-two subcategories have been established based on the chemical product manufactured. In cases where two dissimilar processes are used to manufacture the same product separate limitations have been established within the subcategory. Thus, ranges are provided for, as are other factors, by segmenting the inorganic chemicals manufacturing point source category into discrete subcategories, each with its own limitation. 39 Fed. Reg. 9612 (March 12, 1973).

3. Plaintiffs cite National Resources Defense Council v. Train, 6 E.R.C. 1033 (D.D.C. 1973) in support of their construction of the Act. That case involved a citizen's suit under section 505(a) of the Act to compel the Administrator to publish effluent limitation guidelines after expiration of the time period established by the Act. However, that case did not consider the issue of statutory construction now presented.

4. Section 306(b) provides that the Administrator shall publish regulations "establishing Federal standards of performance for new sources" within a category of sources. Plaintiffs point out that section 509(b)(1)(A) specifically provides for review of these "standards of performance." Section 306(c) authorizes the states to develop a procedure for applying and enforcing standards of performance for new sources located within the state which may then be approved by the Administrator. Plaintiffs contend that the implementation of these standards of performance would occur in permit proceedings which would be subject to approval by the Administrator in a manner similar to section 301(b) effluent limitations.

5. Section 302(a) authorizes the Administrator to "establish" "water quality" related "effluent limitations" when he finds that

> "discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) (the technology-based limitations to be achieved by 1983), would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies...."

6. These pertain to the procedural requirements of a state-operated permit program.

7. There is very little legislative history relative to section 509(b). The bill as originally passed by the House provided for judicial review in the district courts whereas the Senate bill provided for review of certain administrative actions in the Court of Appeals for the District of Columbia and others in the Courts of Appeal for the appropiate circuit. H.R. 11896, 92d Cong., 2d Sess. § 509(b)(1972); S. 2770, 92d Cong., 1st Sess. § 509(b).

HOOKER CHEMICALS & PLASTICS CORP., ET AL., Petitioners	)	
v.	)	No. 74-1687
RUSSELL E. TRAIN, Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 1974, two copies of the Reply Brief for Petitioners in the above-captioned case were served on counsel for Respondent by placing same in the United States mail, first class, postage prepaid, properly addressed to John J. Zimmerman, Attorney, Department of Justice, Washington, D.C.

Henry J. Plog, Jr.

Henry J. Plog, Jr.
ATTORNEY FOR PETITIONERS
Cleary, Gottlieb, Steen & Hamilton
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 223-2151

December 19, 1974